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IN THE

Supreme Court of the United States

J. L. HOFFLUND,
Petitioner,

v.

THE SECRETARY OF THE INTERIOR, Fred A. Seaton; and the CHAIRMAN and MEMBERS OF THE CIVIL SERVICE COMMISSION, Roger W. Jones, Bernard L. Flanagan, and Mrs. Barbara Bates Gunderson,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. L. Hofflund prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled matter on March 12, 1959, affirming a decree of the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinion of the court of appeals in this case (1A) is not reported as yet.

The opinion of the United States District Court for the District of Columbia (T. 8) is not reported.

JURISDICTION

The decree of the Court of Appeals is dated March 12, 1959, and it was entered the same date. There were no

orders respecting a rehearing or granting extension of time within which to petition for certiorari. The statutory provision believed to confer jurisdiction on this court is the Act of June 25, 1948, 62 Stat. 928, 28 USC 1254.

QUESTIONS PRESENTED

1. Does the decree of the trial court, which fails to set aside Petitioner's demotion but permits *nunc pro tunc* or retroactive application of the statutory and regulatory requirements relating thereto, for the purpose of validating the demotion, satisfy the mandate of the Administrative Procedure Act that agency action shall be held "unlawful and set aside" when found by the court to be "not in accordance with law" or "short of statutory right" or "without observance of procedure required by law", and the trial court so found?

2. Does the United States District Court for the District of Columbia have jurisdiction to determine if the rate of pay of a Federal employee conforms to the rate fixed by the Classification Act for the grade of the position which the employee occupies?

STATUTES AND REGULATIONS INVOLVED

Administrative Procedure Act of June 11, 1946; 60 Stat. 237, as amended; 5 U.S.C. 1001-1011.

Sec. 2(g) (5 U.S.C. 1001(g)). ". . . 'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

Sec. 10(a)(b)(c) (5 U.S.C. 1009(a)(b)(c)). "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion . . . (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant stat-

ute, shall be entitled to judicial review thereof . . . (b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject-matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction . . . (c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review . . ."

Sec. 10(e), (5 U.S.C. 1009 (e)). "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law . . . It shall . . . *hold unlawful and set aside* agency action . . . found to be . . . not in accordance with law . . . short of statutory right . . . [or] without observance of procedure required by law . . ." (underscoring added).

Declaratory Judgments Act of June 25, 1948; 62 Stat. 964; 5 U.S.C. 2201.

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . ."

* * * *

NOTE. The Veterans Preference Act and the regulations of the Civil Service Commission, although referred to and cited hereafter, are not involved in this Petition for Certiorari, because review of the decree of the trial court (District Court) on the first question was not sought on account of any impropriety or insufficiency in the findings with respect to said Act and regulations, but

because the decree does not grant the relief required by the findings and the express mandate of the Administrative Procedure Act. Likewise, the Classification Act, although referred to and cited hereafter, is not involved, because review of the decree on the second question was not sought on account of erroneous adjudication thereof, but because of failure to adjudicate it for supposed lack of jurisdiction which the trial court had under the Administrative Procedure Act and the Declaratory Judgments Act.

STATEMENT OF THE CASE

Petitioner (Plaintiff and Appellant below) is a veteran and a career employee in the Federal civil service. Having been demoted, he prosecuted an action in the United States District Court for the District of Columbia against the employing agency (Department of the Interior) and the Civil Service Commission on two counts:

1. To set aside the demotion, pursuant to the Administrative Procedure Act, on the ground that the retention preference procedures provided by section 12 the Veterans Preference Act [1] and the regulations of the Civil Service Commission [2] had been ignored; and

2. For maintenance of pay at the rate fixed for the previous grade, notwithstanding the demotion, pursuant to the provisions of the Classification Act [3] and the regulations of the Civil Service Commission.[4]

The trial court (District Court) found on the first count that the demotion action was invalid because taken

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[1] Act of June 27, 1944; 58 Stat. 387, as amended; 5 U.S.C. 861.

[2] 5 C.F.R. 1958 Supp., 20.1-20.8.

[3] Sec. 507, 70 Stat. 291, as amended, and sec. 603, 63 Stat. 965; 5 U.S.C. Supp. V, 1107, 1113.

[4] 5 C.F.R. 1958 Supp., 25.401-25.411.

without reference to the retention preference procedures provided by section 12 of the Veterans Preference Act, *supra*, and the regulations of the Civil Service Commission, *supra*. Judgment was rendered for Petitioner (Plaintiff and Appellant below) on this count. The judgment, however, did not set aside the demotion, but merely ordered and adjudged ". . . that defendants take appropriate administrative action, consistent with this judgment . . ." Nothing further is contained in the judgment on this count. It does not define "appropriate administrative action," and the court's meaning and intent can be ascertained only by reference to the judge's remarks elsewhere in the record. These reveal that the intent was not to set aside the invalid demotion, but to permit the Defendants to apply the retention preference procedures *"nunc pro tunc"* (as stated by the trial judge) or retroactively to determine whether Petitioner would have been demoted if the procedures had been resorted to in the first instance (T. 15). Just what effect is to be given to such *nunc-pro-tunc* determination is not indicated.

The judgment of the trial court dismisses the second count (for maintenance of salary notwithstanding the demotion), without prejudice, for lack of jurisdiction.

Petitioner (Plaintiff below) appealed from the judgment on both counts to the United States Court of Appeals for the District of Columbia, which affirmed the judgment below.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

(i) Section 10 of the Administrative Procedure Act of June 11, 1946, (60 Stat. 243, 5 USC 1009) gives to the District Courts jurisdiction to review agency action, and to ". . . set aside agency action . . . found to be . . . not in accordance with law . . . short of statutory right . . .

or . . . without observance of procedure required by law . . ."

(ii) The Declaratory Judgments Act of June 25, 1948 (62 Stat. 964, 28 USC 2201-2) gives to the District Courts jurisdiction to ". . . declare the rights and legal relations . . ." of parties to actual controversies.

(iii) Rule 65 of the Rules of Civil Procedure for the United States District Courts recognizes the jurisdiction of those courts to issue a mandatory injunction.

REASONS FOR GRANTING THE WRIT

I. The judgment of the Court of Appeals, affirming the decree of the District Court, ignores and in effect annuls the express mandate of the Administrative Procedure Act.

The demotion of a Federal employee is an "agency action" within the meaning of the Administrative Procedure Act. The trial court (District Court) found that Petitioner's demotion was invalid because the procedural requirements of the Veterans Preference Act and the regulations of the Civil Service Commission were ignored (T. 8-16). The Court of Appeals decision says: "The District Court plainly decided that appellant should have been accorded the Section 12 procedures as prescribed by the Veterans Preference Act, *supra*" (2A). The Administrative Procedure Act requires that ". . . the reviewing court [District Court] . . . shall . . . hold unlawful and set aside agency action . . . found to be . . . not in accordance with law . . . [or] without observance of procedures required by law . . ."

In view of the trial court's findings, the only reasonable, just, or lawful judgment that could be rendered was the one prayed for by Petitioner: ". . . a declaration that the downgrading of Plaintiff's grade and pay effective March 11, 1956, was in violation of Plaintiff's

rights as a 'preference eligible' under the Veterans Preference Act of 1944, as amended, *supra,* and should be rescinded, and Plaintiff's grade and pay restored; and for the mandate of the Court to the Defendants to rescind said demotion and to restore Plaintiff's grade and pay to what it would have been and would now be except for said demotion".

The decision of the Court of Appeals expressly declines to set aside the invalid demotion, and affirms both the incomprehensible decree of the trial court and (by inference) its statements as to what it intended that decree to mean by way of *nunc-pro-tunc* application of the retention preference procedures.

How does the Court of Appeals justify its decision in the face of the mandate of the Administrative Procedure Act? It simply says: "Insofar as appellant here relies upon Section 10 of the Administrative Procedure Act, . . . we note only our consistent refusal to review the merits or wisdom of agency personnel action. . . ." (citations). This remark and the cases cited are totally irrelevant to any issue in this case. The merits or wisdom of agency action are not involved; all that is involved is compliance with the procedural requirements of statutes and regulations as a condition precedent to the exercise of wisdom and discretion. This Petitioner has never suggested, in any of his proceedings, that the court should substitute its wisdom and discretion for that of the agencies in applying the retention preference procedures to the demotion complained of.

Petitioner agrees with the final statement of the Court of Appeals: "Our function is to insure compliance by the agency with the statutory and regulatory requirements applicable in situations such as we here consider, and that we will do." That the Court of Appeals did *not* do. Its decision ignores and nullifies the requirement of the

Administrative Procedure Act that agency action must be *"set aside"* under the circumstances of this case.

Finally, aside from mere legalities, there are obvious reasons why *nunc-pro-tunc* application of the requirements would be inequitable. With the passage of time, reorganizations, shifts in positions, and resignations or dismissals from the service, the determination of retention preference rights as of a date in the past becomes obscure and difficult, and may be impossible for the employee.

II. The judgment of the United States Court of Appeals for the District of Columbia excludes from the District Court's jurisdiction a matter over which it has and frequently exercises jurisdiction.

The Classification Act, *supra,* specifies the rates of pay for the various grades which the agencies allocate to positions in the classified civil service. The Salary Retention Act is an amendment of the Classification Act. The amending act increases the rate of pay fixed for any grade when an employee occupies a position in that grade as the result of a demotion under circumstances specified in the act. The principal circumstance is simply that the demotion occurred through no fault of the employee. For instance, if the grade of an employee's position is reduced from GS-15 to GS-14, and if the case otherwise falls within the provisions of the act, the employee is entitled to receive pay at the GS-15 rate in spite of the fact that the grade allocated to his position has been reduced to GS-14.

Petitioner's second count alleged facts which if true would entitle him to continued pay at the rate of GS-15, although the grade allocated to his position had been reduced to GS-14. The trial court (District Court) refused to adjudicate this issue on the ground that it had no jurisdiction. The reason stated by the trial court

is ". . . that the Court of Claims has exclusive jurisdiction of actions on the part of officers and employees for compensation for services."

Petitioner's second count is not such an action as supposed by the trial court. An action to determine the rate of pay fixed by statute to an employee's grade is not an action for compensation for services. The District Court adjudicates many cases where the issue is the grade to which an employee is entitled, i.e., the court approves or sets aside the demotion or reduction in the grade of the complaining employee. Inasmuch as the rate of pay incident to any grade is fixed by statute, every time the court adjudicates the grade of an employee it adjudicates the rate of his pay. Such adjudication is no judgment for compensation for services such as must be sought in the Court of Claims.

Petitioner's case on his second count is no different from that on his first as far as *jurisdiction* is concerned. The same facts are relevant to both counts. Even though Petitioner might have sought relief in the Court of Claims on his second count, the Rules of the United States District Courts state: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in a case where it is appropriate" (Rule 57). And it has been held that a Federal District Court taking jurisdiction of one issue in an action for declaratory judgment has jurisdiction to settle all issues in the action (Albuquerque Broadcasting Co. v. Regents, 70 F. Supp. 198).

WHEREFORE, the writ of certiorari of this Court to the United States Court of Appeals for the District of Columbia Circuit should issue as prayed for.

J. L. HOFFLUND, *Petitioner*,
pro se.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14768

J. L. HOFFLUND, APPELLANT,

v.

FRED A. SEATON, Secretary of the Interior, et al.,
APPELLEES.

Appeal from the United States District Court
for the District of Columbia

Decided March 12, 1959

Mr. J. L. Hofflund, appellant, pro se.

Mr. Harold D. Rhynedance, Jr., Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief for appellees.

Before EDGERTON, WASHINGTON and DANAHER, *Circuit Judges*.

PER CURIAM: Appellant, a Veterans Preference eligible in grade GS-15, was reassigned in the course of reorganization of the legal staff of the Department of the Interior. Effective March 11, 1956, his title became Attorney Advisor (General) (Assistant Solicitor), his position was graded GS-14, and his salary became $11,395. He sought to reverse his demotion through the various tribunals of the Civil Service Commission which decided adversely to him. He next asked declaratory relief in

the District Court. The district judge ruled that the Government as of March 11, 1956, should have accorded to appellant the benefits of Section 12 of the Veterans Preference Act, 58 STAT. 387 (1944), as amended, 5 U.S.C. § 861 (1952). Accordingly, it was ordered that appellees take appropriate administrative action. The judge declined to consider, and then dismissed, appellant's claim respecting the rate of basic compensation said to be required pursuant to provisions of the Retention of Salary Act, 70 STAT. 291, 5 U.S.C. § 1107 (Supp. V, 1956).

Now attacking the judgment because of fears that its scope is too narrow, appellant asks this court to vacate the judgment of the District Court and to order a new judgment declaring that his demotion was invalid and should be set aside, and that he should be restored to his former grade and pay as though his demotion had never occurred.

We decline to do so. The District Court plainly decided that appellant should have been accorded the Section 12 procedures as prescribed in the Veterans Preference Act, *supra*.[1] We have no reason to doubt that the scope of the remedy to be afforded may readily be discerned by the agency from the record in the District Court. We are not justified in assuming that appellant will not now be accorded full consideration of his status as of March 11, 1956, in accordance with Section 12 provisions and with appropriate administrative inquiry thereafter as to appellant's rights, if any, which may be derived from the Retention of Salary Act, *supra*.

Insofar as appellant here relies upon Section 10 of the Administrative Procedure Act, 60 STAT. 243, 5 U.S.C.

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[1] Whether or not the District Court was correct in so deciding is not at issue here, as the Government did not take a cross-appeal, and advises us that it is prepared to follow Section 12 procedures in appellant's case *nunc pro tunc*. *But see* Steinkirchner v. Wilson, 101 U.S.App.D.C. 92, 247 F.2d 83 (1957).

§ 1009 (1952), we note only our consistent refusal to review the merits or wisdom of agency personnel action. See, e.g., *Hargett* v. *Summerfield*, 100 U.S.App.D.C. 85, 243 F.2d 29 (1957), *cert. denied*, 353 U.S. 970 (1957); *Boylan* v. *Quarles*, 98 U.S.App.D.C. 337, 235 F.2d 834 (1956); *Wagner* v. *Higley*, 98 U.S.App.D.C. 291, 235 F.2d 518 (1956), *cert. denied*, 352 U.S. 936 (1956). Our function is to insure compliance by the agency with the statutory and regulatory requirements applicable in situations such as we here consider, and that we will do.

Accordingly, in the light of our comment and that of the district judge as disclosed by the record, the judgment remanding the case to the Department is

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958.

No. 14,768

C. A. 4747-56

J. L. HOFFLUND, APPELLANT,

v.

FRED A. SEATON, Secretary of the Interior, et al.,
APPELLEES.

United States Court of Appeals
For the
District of Columbia Circuit

Filed March 12, 1959
Joseph W. Stewart, Clerk

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Washington and Danaher, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: March 12, 1959